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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 323

GRASS CREEK OIL & GAS COMPANY, a corporation, and ELMER HENTON,

Petitioners,

vs.

MUSSELSHELL COUNTY, MONTANA, a political subdivision of the State of Montana; J. A. FREIBERT, FRANCES DRAKE O'NEILL, ALTHEA V. MARIS, and THE TEXAS COMPANY, a corporation,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of Montana

G. J. JEFFRIES,
Roundup, Montana,
Attorney for Petitioner.

H. CLEVELAND HALL,
Great Falls, Montana,
Of Counsel.

SUBJECT INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
The Statutes involved	3
Statement	
1. The Claims of Petitioners to title to the mineral interests under the land involved are based upon conveyances which were not affected by either tax deed proceedings or adverse possession	4
2. The Petitioners are not estopped to claim title to the mineral interests, either by contract or by judgments entered by the District Court of Musselshell County	8
3. Conclusion	14
Appendices:	
Appendix A—Complaint, Grass Creek Oil & Gas Co. v. Musselshell County et al	65
Appendix B—Decree—Grass Creek Oil & Gas Co. v. Musselshell County et al	25
Appendix C—Finding—Grass Creek Oil & Gas Co. v. Hinton et al	33
Appendix D—Findings and Conclusions—Hinton v. Staunton et al	34
Appendix E—Complaint, Staunton, Executor v. Tabor et al	42
Appendix F—Judgment, Staunton, Executor v. Tabor et al	47
Appendix G—Opinion, Grass Creek Oil & Gas Co. and Hinton v. Musselshell County	55
Appendix H—Order denying Rehearing, Grass Creek Oil & Gas Co. and Hinton v. Musselshell County	63

TABLE OF AUTHORITIES CITED

Cases

	Page
Anaconda Copper Min. Co. v. Ravalli County, 52 Mont. 422, 158 Pac. 682	7
British American Oil Producing Co. v. Board of Equalization, 299 U. S. 159; 81 L. Ed. 95	7
Butterfield v. Nogales Copper Co. (Ariz.) 95 Pac. 182	12
Cook v. Rigney, 113 Mont. 198, 126 Pac. (2d) 325	10
Douglass v. Mourice (Okla.) 303 Pac. (2d) 430	11
Grass Creek Oil & Gas Co. v. Musselshell County, 124 Mont. 594, 228 Pac. (2d) 968	11
Hentzy v. Mandan Loan and Inv. Co., 129 Mont. 324, 286 Pac. (2d) 325	11
Hinton v. Staunton, 124 Mont. 534, 228 Pac. (2d) 461	12, 13
Hinz v. Musselshell County, 82 Mont. 502, 267 Pac. 1113	7
Hume's Estate, 128 Mont. 223, 272 Pac. (2d) 999	7
Lehfeldt v. Adams, 130 Mont. ....., 303 Pac. (2d) 934	8, 13
Lowery v. Garfield County, 122 Mont. 564, 208 Pac. (2d) 325	11
McAlpin v. Smith, 123 Mont. 391, 213 Pac. (2d) 602	14
Musselshell County v. Morris Dev. Co., 92 Mont. 201, 11 Pac. (2d) 774	7
Northern Pac. Ry. Co. v. Mjelde, 48 Mont. 287, 137 Pac. 386	7
Northern Pac. Ry. Co. v. Musselshell County, 54 Mont. 96, 169 Pac. 53	7
Rist v. Toole County, 117 Mont. 426, 159 Pac. (2d) 340	7
State ex rel Costello v. Court, 86 Mont. 387, 284 Pac. 128	12

STATUTES

	Page
Constitution of Montana, Art. XII, Sec. 3	3, 7
Revised Codes of Montana, 1947:	
Section 84-301	3, 7
Section 93-2513	3
U. S. C. A.:	
Section 1257 (3)	2

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MUSSELSHELL COUNTY, MONTANA, a political subdivision of the State of Montana; J. A. FREIBERT, FRANCES DRAKE O'NEILL, ALTHEA V. MARIS, and THE TEXAS COMPANY, a corporation;

Respondents.

Petition for Writ of Certiorari to the Supreme Court of Montana

To The Honorable Chief Justice and To The Associate Justices of the Supreme Court of the United States:

Petitioners, Grass Creek Oil & Gas Company, a corporation, and Elmer Hinton, respectfully pray that a writ of Certiorari issue to review the judgment of the Supreme Court of Montana entered in the above cause on the 1st day of March, 1957. The Supreme Court of Montana affirmed the judgment entered by the District Court of the Fourteenth Judicial District of the State of Montana,

in and for the county of Musselshell and decided that the Petitioners had no right, title or interest in the oil, gas and other minerals in and under certain lands situated in Musselshell County, Montana.

OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Judgment of the District Court in and for Musselshell County, Montana, appear as Appendix B hereto. The opinion of the Supreme Court appears as Appendix G hereto. Such opinion has not been officially reported but appears in 307 Pac. (2d) 241.

JURISDICTION

The opinion of the Supreme Court affirming the judgment of the District Court was rendered and filed January 3, 1957, (Appx. G, p. 55). Petition for rehearing was filed within time, and on March 1, 1957, the Supreme Court denied the Petition for Rehearing. (Appx. H, p. 63). Remittitur to the District Court issued on March 1, 1957, affirming the judgment of the District Court; and was filed in the District Court March 4, 1957. Jurisdiction of this Court is invoked under 28 U.S.C.A., sec. 1257 (3). Order of this Court was made May 31, 1957, extending time for filing this Petition to and including July 30, 1957.

QUESTIONS PRESENTED

1. Whether, under the facts here presented and the law applicable thereto, property of the Petitioners has been taken from them without due process of law contrary to the provisions of the Constitution of the United States, Amendment 5.

CONSTITUTIONAL PROVISIONS AND STATES INVOLVED

Art. XII, Sec. 3, Constitution of Montana, provides:

All mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal or other valuable minerals deposits, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, unless the surface ground, or some part thereof, of such mine or claim, is used for other than mining purposes, and has a separate and independent value for such other purposes, in which case said surface ground, or any part thereof, so used for other mining purposes, shall be taxed at its value for such other purposes, as provided by law; and all machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims which have a value separate and independent of such mines or mining claims, and the annual net proceeds of all mines and mining claims shall be taxed as provided by law.

Sec. 84-301, Revised Codes of Montana, 1947, provides:

For the purpose of taxation the taxable property in the state shall be classified as follows:

Class One. The annual net proceeds of all mines and mining claims, after deducting only the expenses specified and allowed by section 84-5403; also where the right to enter upon land, to explore or prospect, or dig for oil, gas, coal or mineral is reserved in land by any person or corporation, the surface title to which has passed to another, the assessor and the state and county boards of equalization shall determine the value of the right to enter upon said tract of land for the purpose of digging, exploring, or prospecting for gas, oil, coal or minerals, and the same shall be placed in this classification for the purpose of taxation.

Sec. 93-2513, Revised Codes of Montana, 1947, provides:

In no case shall adverse possession be considered established under the provision of any section or sections of this code unless it shall be shown that the land has

been occupied and claimed for a period of ten years continuously and the party or persons, their predecessors and grantors, have, during such period paid all the taxes, state, county, or municipal, which have been legally levied and assessed upon said land.

STATEMENT

1.

The claims of Petitioners to title to the mineral interests under the lands involved are based upon conveyances which were not affected by either tax deed proceedings or adverse possession.

Petitioners claim ownership of the oil, gas and other minerals in and under certain lands located in Musselshell County, Montana, described as: Southwest quarter, (SW¼) of Section 24, Township 10 North, Range 26 East, and the West half of the Southeast quarter, (W½SE¼) of the same section, townships and range.

The basis of such claim of ownership is as follows:

1. As to the Southwest quarter (SW¼) section 24, Township 10 North, Range 26 East. (Appdx. D, p. 34).

(a) The United States patented the land to William H. Brown on April 21, 1915.

(b) Brown mortgaged the land to Bankers Farm Mortgage Company on December 9, 1919.

(c) Brown conveyed to W. C. Scott and Fred W. Kroger all of the oil, gas and other minerals under the Northwest quarter of the Southwest quarter (NW¼-SW¼) section 24 on May 11, 1920.

(d) Brown conveyed an undivided one-half (½) interest in the oil, gas and other minerals under the South half of the Southwest quarter, (S½SW¼) and the

Northeast quarter of the Southwest quarter, (NE¼ SW¼) to Brooks and Richardson, trustees on September 30, 1920.

(e) Brooks and Richardson, trustees, conveyed their undivided one-half interest to petitioner Grass Creek Oil & Gas Company on October 6, 1920.

(f) Bankers Farm Mortgage Company foreclosed its mortgage (b) by decree of court dated March 6, 1923 and sheriff's deed issued January 7, 1949. Service of summons was made upon Brown but no service was made upon Grass Creek Oil & Gas Company or Scott and Kroger.

(g) The mineral interests of Grass Creek Oil & Gas Company and Scott and Kroger were never separately assessed for tax purposes and no taxes were levied upon their separate estates.

(h) Upon application of Musselshell County a tax deed was issued to it covering the Southwest quarter (SW¼) section 24 on October 17, 1927 for taxes levied in 1921. This tax deed was held to be void by the District Court of Musselshell County, Montana, and to convey no title to the county. (Appdx. D, p. 40).

(i) Nevertheless, Musselshell County conveyed the land to John Whelan on August 3rd, 1938, reserving a 2½% mineral interest therein.

(j) Bankers Farm Mortgage Company conveyed its interest in the minerals and surface to petitioner Hinton on March 28, 1949.

2. *As to the West half of the Southeast quarter (W½ SE¼) section 24, Township 10 North, Range 26 East. (Appdx. D, p. 38).*

(a) Patent issued from the United States to Harry C. Brown on April 21, 1915.

(b) Brown conveyed an undivided one-half interest in the oil, gas and other minerals to Brooks and Richardson, trustees, on September 30, 1920.

(c) Brooks and Richardson conveyed their interest to Grass Creek Oil & Gas Company on October 6, 1920.

(d) The mineral interests and the right of entry owned by Grass Creek Oil & Gas Company were never separately assessed for taxation purposes and no tax was ever levied upon such interest.

(e) Nevertheless, a tax deed to the land was issued to Musselshell County on February 16, 1929 for taxes levied in 1919.

(f) Thereafter Musselshell County conveyed its interest in the land to John Whelan on August 3rd, 1938, reserving a 2½% mineral interest.

(g) By deed dated May 6, 1949 and June 24, 1949, Catherine Brown Moffett and Della R. Brown, as heirs of Harry C. Brown conveyed their interest in the land and minerals to petitioner herein, Elmer Hinton.

As of January 23, 1950, there were no oil or gas wells upon either the Southwest quarter or the West half of the Southeast quarter of section 24, nor had there been any development of said lands for oil, gas, or any other minerals. (Appdx. C, p. 33).

Up to this point there would seem to be no question but that under the Findings and Conclusions of the District Court of Musselshell County in the Hinton vs. Staunton case; (Appdx. D, p. 34), and the Grass Creek Oil and Gas Company case, (Appdx. C, p. 33), Petitioners were the owners of the mineral interests claimed by them,

and that neither the District Court of Musselshell County nor the Supreme Court had jurisdiction to take that title away from them, either upon the theory of tax deed proceedings or adverse possession. Such is the established law in Montana.

The conveyances by the original patentees of the minerals in and under the lands involved created two separate estates—one consisting of the surface and the other of the minerals.

British American Oil Producing Company v. Board of Equalization, 299 U. S. 159, 81 L. Ed. 95;

Rist v. Toole County, 117 Mont. 426, 159 Pac. (2d) 340;

In re Hume's Estate, 128 Mont. 223, 272 Pac. (2d) 999.

The separate estates or titles must be taxed separately to their respective owners.

Northern Pac. Ry. Co. v. Mjelde, 48 Mont. 287, 137 Pac. 386;

Anaconda Copper Min. Co. v. Ravalli County, 52 Mont. 422, 158 Pac. 682;

Musselshell County v. Morris Development Co., 92 Mont. 201, 11 Pac. (2d) 774.

Minerals cannot be taxed in place under the provision of Article XII, section 3 of the Montana Constitution and section 84-301 Revised Codes of Montana, 1947, quoted supra, p. 3.

Hinz v. Musselshell County, 82 Mont. 502, 267 Pac. 1113;

Northern Pac. Ry. Co. v. Musselshell County, 54 Mont. 96, 169 Pac. 53.

The right of entry upon the land for the purpose of exploring for and producing oil, gas and other minerals could have been taxed under section 84-301, but, as we

have seen no tax was ever levied or assessed upon such interest or estate. In such case no tax deed taken upon the interest or estate now held by petitioners could be valid.

Lehfeldt v. Adams, 130 Mont. ...., 303 Pac. (2d) 934.

It further appears, (Appdx. C, p. 33), that no oil or gas well had been drilled upon the land nor had there been any development of the land for the production of oil, gas or any other minerals as late as January 23, 1950. In such a situation there could be no claim of title to the oil, gas or other minerals by adverse possession.

Lehfeldt v. Adams, 130 Mont. ...., 303 Pac. (2d) 934.

Such, then, was the situation in 1927 and 1929 when Musselshell County purported to take tax deeds to the land and the minerals. Such was the situation in 1938 when Musselshell County conveyed the land and minerals to John Whelan; and, such was the situation in 1947 when the executor of the Whelan estate attempted to quiet title to the land.

2.

The Petitioners are not estopped to claim title to the mineral interests, either by contract or by judgments entered by the District Court of Musselshell County.

On February 29, 1944, Whelan entered into a contract for deed with the appellant, Hinton, whereby Whelan agreed to sell the surface of the Southwest quarter (SW¼) and the West half of the Southeast quarter (W½SE¼) to Hinton, Whelan reserving all of the minerals under the land. This contract provided, among other things, "It is understood that action is being taken by first party *to quiet title to the lands sold*. If Decree has not been issued by July 1, 1944, the $1,000 payments due

then may be deferred without interest until such decree has been issued." (Hinton v. Staunton, 124 Mont. 534, 228 Pac. (2d) 461.)

Pursuant to the above contract provision the executor of the estate of Whelan filed on the 24th day of April, 1947, an action to quiet title to the lands Whelan had contracted to sell to Hinton alleging, among other things, that "the above mentioned John Whelan, deceased, *for a long period of time before his decease had* been, and at the time of his decease was the owner of and in the actual, notorious and undisputed possession of *the following described real estate*, lying and being in the County of Musselshell, State of Montana; to-wit:

> The Southwest quarter (SW¼) . . . of Section 24, Township 10 North, Range 26 East of the Montana Meridian,

subject, however, to certain oil and gas royalties . . ." etc. (Appdx. E, p. 42).

Hinton was not a party to the action but Scott, Kroger, Grass Creek Oil & Gas Company and Bankers Farm Mortgage Company were made defendants and served with process. All defendants defaulted and decree followed in which it was found by the Court that "the above mentioned John Whelan, deceased, for a long period of time before his decease had been, and at the time of his decease was the owner of and in the actual, notorious and undisputed possession of the following described real estate, lying and being in the County of Musselshell, State of Montana, to-wit:

> The Southwest quarter (SW¼) . . . of Section 24, Township Ten (10) North, Range Twenty-six (26) East of the Montana Meridian . . . .

subject, however, to certain oil and gas reservations . . ." etc. (Appdx. F, p. 47).

Judgment was entered accordingly on the 7th day of August, 1947. (Appdx. F, p. 47).

On April 4th, 1949, Bankers Farm Mortgage Company conveyed to Hinton all of its interest in the lands here involved.

The only title adjudicated by this default decree was one which the court in a later decree found was based upon a void tax deed which, in the words of the Court's decree (Appdx. D, p. 34), "was invalid and of no legal effect, and that Musselshell County acquired no right, title, or interest in said land through the tax deed."

There was no claim of adverse possession and no adjudication of title by adverse possession. The only allegation or finding in that respect was that Whelan "*for a long period of time* before his decease had been, and at the time of his decease was the owner of and in the actual, notorious and undisputed possession" of the land here involved. (Appdx. E and F.)

Such an allegation and finding does not fulfill the requirements of our statute, which required adverse possession for a period of *ten years* prior to the commencement of the action plus payment of taxes—not "for *a long period* prior to his decease."

In Cook v. Rigney, 113 Mont. 198, 126 Pac. (2d) 325, this Court said:

> "To establish title by adverse possession it was incumbent on the adverse claimant, in addition to the payment of taxes, to prove that her holding of the real estate was open, notorious, continuous, exclusive and adverse under a claim of right during the full ten year statutory period, and that there was an invasion of the

right of the owner which he failed to assert until the full statutory period had passed."

In addition, of course, there could have been no adverse possession of the mineral interests by Whelan under the decision of this Court in the Leifeldt case, for, as the lower Court found in the case of *Grass Creek Oil & Gas Company v. Musselshell County, M. D. Staunton, Executor, et al. No. 5406, 124 Mont. 594*, in its Findings and Conclusions dated January 23rd, 1950, "There are no oil or gas wells on the lands described in plaintiff's complaint, and there has been no development thereof for oil, gas or any other minerals." (Appdx. C, p. 33).

Douglass v. Maurice (Okla.), 303 Pac. (2d) 430;

Lowery v. Garfield County (Mont.), 208 Pac. (2d) 478.

While a tax deed though void may be ample as color of title so as to sustain a claim of adverse possession, *Hentzy v. Mandan Loan and Inv. Co., (Mont.), 286 Pac. (2d) 325, 327*, it is clear that *without the full statutory period of adverse possession* such a deed is completely worthless for any purpose.

Lowery v. Garfield County, (Mont.) 208 Pac. (2d) 478.

Further, it seems clear that there was no intention or purpose that the quiet title action brought by Staunton, executor, should adjudicate title to the minerals under the land. That intention and purpose was thus expressed in the contract between Hinton and Whelan—"It is understood that action is being taken by first party to quiet title *to the lands sold.*" No minerals were contracted to be sold by Whelan to Hinton for Whelan expressly reserved

"all oil and gas rights, together with the right to enter, explore for and remove such oil and gas."

The prayer of plaintiff's complaint in the case of Staunton, executor, v. Tabor, et al., No. 5258, is that "the court adjudge and decree that the said estate of John Whelan, deceased, is the owner in fee simple of said above described real estate and premises, free and clear of all claims, demands, liens and encumbrances, save and except the royalty claims above mentioned," etc. (Appdx E, p. 42).

Under this prayer there is no evident purpose to adjudicate title to the severed mineral estate owned by parties other than Whelan.

As was pointed out by this Court in the case of *State ex rel Costello v. District Court, 86 Mont. 387, 393, 284 Pac. 128*, if the default decree does attempt to adjudicate such title, then "it has no pleading at all to support it, and is therefore, to that extent, invalid and subject to collateral attack."

It is stated in the opinion of the Supreme Court in the case of *Hinton v. Staunton, 124 Mont. 534, 228 Pac. (2d) 461*, that Hinton, by reason of his contract with Whelan "is estopped to assert title adverse to the title of the estate of John Whelan" to the oil and gas in and under the lands which Hinton contracted to purchase. As to this reserved estate there is no such estoppel. Hinton at no time agreed to buy the minerals from Whelan. He only contracted to purchase the surface of the land so far as concerns the oil and gas rights. As was pointed out by the Supreme Court of Arizona in the case of Butterfield v. Nogales Copper Co., (Ariz.), 95 Pac. 182, 185:

> "A vendee under a contract to purchase may not dispute his vendor's title, nor purchase and assert against his vendor an adverse title. This rule applies to land which the vendee has agreed to purchase, and which is the subject matter of his contract and does not extend to land not within the agreement of the parties. Such must be the limitation of the doctrine, for the vendee is such only as to land he has agreed to buy, and as to the title to other property of his vendor he is a stranger."

Casting aside then the matter of estoppel as mere dicta arising from a mistaken analysis of the facts, we find ourselves confronted with the following situation: In *Cause 5258, Staunton, Executor v. Tabor, et al*, the lower court entered a decree quieting title in the estate of John Whelan, deceased, to the Southwest quarter (SW¼) and the West half of the Southeast quarter (W½SE¼) of Section 24, Township 10 North, Range 26 East, upon the sole basis of a tax deed, which the same court in *Hinton v. Staunton*, affirmed by the Supreme Court in *124 Mont. 534*, held was absolutely void to confer any title in Whelan. There was not and could not be any pleading or proof of adverse possession by Whelan of either the surface or the minerals. In other words, the Court, under the complaint in No. 5258, had no jurisdiction to find in its default decree that Whelan was the owner of either the surface or the minerals. Yet this void default decree in No. 5258 is the basis of this Court's decisions in the cases of Hinton v. Staunton, 124 Mont. 534; Grass Creek Oil & Gas Company v. Musselshell County, 124 Mont. 594; and in the decision in the present case. In other words, the Supreme Court of Montana in its present decision departs from the rule laid down by it in the case of *Lehfeldt v. Adams*, 303 Pac. (2d) 934, upon the basis

of a default decree which itself has no basis in law or in fact and to which the appellant Hinton was not a party.

A plaintiff does not gain or create a title in himself through the offices of a quiet title action or decree. He may only prevail upon pleading and proof of a paramount title. He can only succeed on the strength of his own title and not upon the weakness of his adversary's.

McAlpin v. Smith, 123 Mont. 391, 213 Pac. (2d) 602.

3.

CONCLUSION

Petitioners have through a decree of the District Court of Musselshell County, affirmed by the Supreme Court, lost valuable interests, all because of a default decree to which one of the Petitioners was not a party, and which was never intended to judge the title to the oil, gas and other minerals in and under the land. Through a series of decisions of the District Court, affirmed by the Supreme Court, Whelan's title has been shown to be invalid for any purpose. Yet he and his successors emerge with a title he and they never had. This we submit is the taking of property without due process of law.

Respectfully submitted,

G. J. JEFFRIES,
Attorney for Petitioners.

H. CLEVELAND HALL,
Of Counsel.

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF MONTANA

GRASS CREEK OIL & GAS COMPANY, a corporation, and ELMER HINTON,

Plaintiffs and Appellants,

vs.

MUSSELSHELL COUNTY, MONTANA, a political subdivision of the State of Montana; J. A. FREIBERT, FRANCES DRAKE O'NEILL, ALTHEA V. MARIS, and THE TEXAS COMPANY, a corporation,

Defendants and Respondents.

COMPLAINT

FOR CAUSE OF ACTION against the Defendants herein, Plaintiffs COMPLAIN and ALLEGE:

1. That plaintiff, Grass Creek Oil & Gas Company, is now and at all of the times mentioned herein was, a corporation, organized, existing and doing business under and by virtue of the laws of the State of Montana.

2. That defendant, Musselshell County, is a political subdivision of the State of Montana; that defendant, The Texas Company, is now and at all of the times herein mentioned was, a corporation, organized and existing under and by virtue of the laws of the State of Delaware; and, that said company now holds an oil and gas lease on the lands hereinafter described.

3. That Harry Brown and William Brown, both now

deceased, acquired patents from the United States, without reservation, to the SE¼ and the SW¼ of Section 24, Township 10 North, Range 26 East, Musselshell County, Montana, July 29, 1915, and September 13, 1915, respectively.

4. That said respective Patentees, October 14, 1920, duly conveyed an undivided one-half interest in and to the minerals under the S½ and the NE¼SW¼, and the W½SE¼ of said Section 24, and that said undivided one-half interest therein was on said date duly conveyed plaintiff, Grass Creek Oil & Gas Company; that these plaintiffs and their predecessors in interest now are, ever since have been and at all times were, the owners of all of the minerals and mineral rights in and under said premises; that said ownership has been for more than thirty years segregated from the surface of said lands, constituted and constitutes separate rights and estates therein, and fee simple titles thereto.

5. That notwithstanding, said minerals and mineral rights were so segregated from the surface and separately owned, are and were at all times private property, and that same had not been taxed or assessed, and that no taxes were due thereon, the said defendant, Musselshell County, Montana, on or about the 23rd of January, 1928, issued a purported tax deed for the said SW¼ and April 5, 1929, a purported tax deed for the W½SE¼ of said Section 24, which said tax deeds were without reservation and purportedly included all the minerals and mineral rights in and under the surface of said lands.

That the ownership or claims of ownership of said individual defendants and Musselshell County to the

royalty and minerals under said premises is based upon said purported deeds, and not otherwise.

That said tax deed do, and each thereof does, constitute a cloud upon plaintiffs' title to said mineral and royalty interests.

6. That at the time, long prior to, and long after said tax deeds were issued and tax deed proceedings were initiated, the surface of said lands and all thereof were occupied; that no notice whatever of any tax deed proceedings was timely, or at all, served upon the occupants thereof.

That at the time said tax deeds were issued there had been no development whatever of the minerals in or under said premises, or under any of the lands described therein, and that the said underground or mineral interests were in all and every respect in their natural state, not susceptible of taxation, and as aforesaid, no taxes had been levied or were due thereon; that the only development thereof to date is three oil wells drilled thereon at the special instance and request of plaintiffs subsequent to October 26, 1950; that except the drilling of said three wells, no person or persons whomsoever, directly or indirectly by any act or acts, reduced to possession said royalty and mineral interests purportedly conveyed by said tax deeds, and that no testimony was offered or admitted in evidence in Cause No. 5258 or in Cause No. 8976 of possession, adverse or otherwise, to or of said royalty or mineral rights.

That said purported tax deeds covering both the surface and minerals were and are wholly void, and of no force or effect.

7. That subsequently and on the 7th day of July, 1933, Defendant Musselshell County, contracted to sell one John Whelan, now deceased, with other lands, the said SW¼ and the W½SE¼ of said Section 24, thereby and by supplementary contracts expressly reserving a two and one-half per cent royalty in the minerals thereunder; that thereafter said Defendant County, pursuant thereto, issued a purported deed therefore, reserving royalty interests therein of two and one-half per cent.

8. That the said John Whelan, September 16, 1943, purported to convey to J. A. Freibert, with other property, an undivided one per cent royalty interest in and under the W½SE¼; and, the S½ and the NE¼SW¼ of said Section 24, Township 10 North, Range 26 East.

That the said John Whelan, September 5, 1943, purported to convey to Frances Drake O'Neill, with other property, an undivided one per cent royalty interest in said property.

That the said John Whelan, September 16, 1943, purported to convey to Mary Matilda Maris, with other property, and undivided one per cent royalty interest in and to said property, and that subsequently said royalty interest was purportedly conveyed to defendant, Althea V. Maris.

That as plaintiffs are informed, verily believe, and allege the fact so to be, the name of C. F. Maris used in the pleadings and Decree in Cause No. 5258 was erroneous and that Mary Matilda Maris, now Mary Matilda Severson, to whom a one per cent royalty interest was conveyed the 16th of September, 1943, was in fact the person referred to.

9. That the Executor of the Estate of John Whelan,

deceased, filed and prosecuted to final and default Judgment, an action in the District Court of Musselshell County, Montana, entitled M. D. Staunton, as Executor of the Estate of John Whelan, Deceased, vs. Ira R. Tabor, et al, to quiet title to the hereinbefore described premises, together with other lands, based upon said purported tax deeds, same being identified upon the records and files of said Court as Cause No. 5258; that no issue was raised by plaintiff's complaint therein regarding said mineral rights, but same were specifically excluded therefrom, viz, Paragraph V:

> "That John Whelan, deceased, was the owner of * * * said lands * * * subject, however, to certain oil and gas royalties which said deceased had sold and conveyed to Frances Drake O'Neill, J. A. Freibert and C. F. Maris, certain reservations of oil, gas and mineral rights in a part of said premises made by the County of Musselshell, * * * that the said real estate * * * is the property of the said estate of John Whelan, deceased, subject to the exceptions and property rights above mentioned."

10. That the individual defendants herein were not, nor was said county or Plaintiff Hinton, joined either as parties plaintiff or defendant therein; that there was no issue, determination or adjudication of any of the royalty or mineral interests claimed by the defendants herein, or of plaintiffs' claims thereto or therein, but that adjudication and determination thereof was in said Decree, specifically excepted and reserved, Paragraph V, Courts' Findings, viz:

> "That John Whelan, deceased, * * * was the owner of: * * * The Southwest quarter (SW¼) and the West one-half of the Southeast quarter (W½SE¼) of Section Twenty-four (24); Township Ten (10) North, Range Twenty-six (26) East of the Montana

Meridian; * * * subject, however, to certain oil and gas royalties which said deceased had sold and conveyed to Frances Drake O'Neill, J. A. Freibert and C. F. Maris, certain reservations of oil, gas and mineral rights in a part of said premises made by the said County of Musselshell, Montana * * * ."

Paragraph 2 of the Court's Conclusions of law:

" * * * that the plaintiff is entitled to a Judgment and Decree decreeing that the said estate of John Whelan, deceased, is the owner in fee simple of said above described real estate and premises, free and clear of all claims, demands, liens and encumbrances, save and except the royalty claims above mentioned of Frances Drake O'Neill, J. A. Freibert and C. F. Maris, the oil, gas and mineral reservations of record in favor of the County of Musselshell, State of Montana, * * * . IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said estate of John Whelan, deceased, is the owner in fee simple of said above described real estate and premises, free and clear of all claims, demands, liens and encumbrances, save and except the royalty claims above mentioned of Frances Drake O'Neill, J. A. Freibert, C. F. Maris, the oil, gas and mineral reservations of record in favor of the County of Musselshell. * * * That the lands and premises mentioned herein and described * * * are described as follows, to-wit: The Southwest quarter (SW¼) and the West one-half of the Southeast quarter (W½-SE¼) of Section Twenty-four (24), Township Ten (10) North, Range Twenty-six (26) East of the Montana Meridian; * * * subject, however, to certain oil and gas royalties which said deceased had sold and conveyed to Frances Drake O'Neill, J. A. Freibert and C. F. Maris, certain reservations of oil, gas and mineral rights in a part of said premises made by the said County of Musselshell, Montana. * * * "

That said Judgment and Decree constitutes a cloud upon plaintiffs' titles to said mineral rights and royalties insofar as same are in any manner affected thereby; that

a copy of said Decree is hereunto attached, marked Exhibit A, and expressly made a part hereof.

11. That Plaintiff Hinton, thereafter duly filed in the above entitled Court and prosecuted to final Judgment, Cause No. 5342, entitled Elmer Hinton vs. M. D. Staunton, the appointed and acting Executor of the Estate of John Whelan, deceased, et al, to set aside said Judgment and Decree so rendered in said Cause No. 5258; that the individual defendants herein were not, nor were any thereof, joined as parties plaintiff or defendant in said action; that said royalty interests claimed by said individual defendants were not an issue, and that their titles thereto were not, nor was any part thereof adjudicated or determined therein.

That the Court, based upon the Judgment and Decree in Cause No. 5258, rendered an adverse decision and duly decreed the Judgment therein was res adjudicata, binding upon plaintiffs, and that Hinton's said action was a collateral attack rather than a direct attack upon said Judgment and Decree; that the said Judgment upon Appeal was affirmed by the Supreme Court.

12. That while the claims of the defendants herein were and are based upon said void tax deeds, and the tax deed to the said SW¼ was duly adjudged to be void, as appears from the Court's Findings of Fact and Conclusions of Law in its Final Judgment and Decree in said Cause, viz:

> "* * * that the tax deed hereinbefore mentioned purporting to convey the SW¼ of Section 24, Township 10 North, of Range 26 East, to Musselshell County, Montana, was invalid and of no legal effect and that Musselshell County acquired no right, title or interest in said lands through said tax deed."

The Court, nevertheless, perpetually enjoined and restrained plaintiffs from asserting any right, title, claim or interest in or to any of the minerals or mineral rights in or under said lands; that a copy of said Judment and Decree is hereunto attached, marked Exhibit B, and made a part hereof.

That said Judgment and Decree has and does constitute a cloud upon plaintiffs' title to the royalty and mineral interests in and under said lands;

That there is and was no testimony offered or admitted in evidence in Cause No. 5258 or in Cause No. 5342 of possession, adverse or otherwise, of said royalty or mineral rights; that the Court in making and entering said Decrees without any supporting evidence purporting to adjudicate, determine or affect the rights of the parties herein based upon adverse possession, acted in excess of and without jurisdiction; that same were and are a denial of the equal protection of the laws, and appropriation of private property without due process, a violation of plaintiffs' constitutional rights, and wholly void.

13. That said tax deeds are and were void for the further reasons that:

(a) Defendant Musselshell County was without right or authority to collect taxes on, or to issue tax deeds for the same in that such property was not susceptible of taxation, could not be and was not assessed or taxed, and that no taxes were due or unpaid thereon.

That said Defendant Musselshell County was without right or authority to sell, or to issue a tax deed for said minerals, or any interest therein, owned by plaintiffs, to collect taxes claimed or allegedly due by other property owners.

That the said County is and was without right or authority to reserve or assert title to two and one-half per cent of plaintiff's property, and particularly any interest in or of the minerals under said premises.

(b). That the District Court in said Cause No. 5258 was without right or authority to adjudicate or determine the said respective claims of said County and said individually defendants, or plaintiffs' rights thereto, in that Plaintiff Hinton and said defendants were not made parties to said action, and said rights were not an issue in said Cause.

That the District and Supreme Courts in Cause No. 5342 were without authority to adjudicate or determine the said royalty claims of the said individual defendants and plaintiffs' rights thereto, as such claims were not an issue in said Cause and said individual defendants were not joined as parties plaintiff or defendant in said action.

(c) The claims of said individual defendants and Musselshell County being based exclusively upon void tax deeds, and tax deed to the said SW¼ of Section 24 in said Cause No. 5342 being so adjudged, the Court exceeded its jurisdiction in enjoining and restraining plaintiffs from asserting ownership of and their claims to said royalty and mineral interests.

14. That the Defendant Musselshell County exceeded its jurisdiction in the issuance of said tax deeds for said minerals and mineral rights in and under the said W½ SE¼; and, the S½ and the NE¼SW¼ of Section 24, Township 10 North, Range 26 East, in purporting to convey the royalty interests hereinbefore set forth and in attempting to reserve two and one-half per cent of the

minerals therein, and all and every act in connection therewith was contrary to law, void, and a violation of plaintiffs' constitutional rights.

(a) That the said injunction and Judgments of the Court in said actions were and are in excess of jurisdiction, contrary to law, in violation thereof, a denial of the equal protection of the laws, and void; that the appropriation and confiscation of plaintiffs' property thereby, and by said void tax deeds, or at all, was and is in controvention of plaintiffs' constitutional rights and particularly Section 27 of Article 3 of the Constitution of Montana, and the 5th Amendment to the Federal Constitution, viz:

"No person shall be deprived of * * * property without due process of law."

Also the 14th Amendment to the Constitution of the United States, viz:

"No state shall * * * deprive any person of * * * property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

WHEREFORE, plaintiffs pray Judgment:

Decreeing said tax deeds and said Court Decrees void; that the defendants take nothing thereby, or at all; that the said clouds on said property and said injunction be vitiated and held for naught; and that Musselshell County and said individual defendants be perpetually restrained and enjoined from in any manner interfering with plaintiffs' use, occupancy and enjoyment of said five and one-half per cent royalty and mineral interest in the lands hereinbefore set forth and described.

For plaintiffs' costs and disbursements herein incurred.

and expended, together with all other and further relief in the premises as to the Court may seem meet and proper.

W. B. LEAVITT;
G. J. JEFFRIES,
Attorneys for Plaintiffs.

(Duly verified)
Filed June 26, 1951.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF MONTANA.

GRASS CREEK OIL & GAS COMPANY, a corporation, and ELMER HINTON,

Plaintiffs and Appellants,

vs.

MUSSELSHELL COUNTY, MONTANA, a political subdivision of the State of Montana; J. A. FREIBERT, FRANCES DRAKE O'NEILL, ALTHEA V. MARIS, and THE TEXAS COMPANY, a corporation,

Defendants and Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed February 18, 1953

The above entitled action having come on regularly for trial on the 1st day of May, 1952, before the Court, the Honorable C. F. Holt, Judge presiding, sitting without a jury and the plaintiffs appearing by their attorneys, G. J. Jeffries, Esquire, and W. B. Leavitt, Esquire, and the defendant Musselshell County, Montana, appearing by its County Attorney, J. M. Watts, Esquire, and the defendants J. A. Freibert, Frances Drake O'Neill and Althea V. Maris, appearing by their attorneys, Ralph J. Anderson, Esquire, and W. S. Mather, Esquire, and evidence having been received and the parties hereto having been granted time in which to file briefs and proposed findings of fact and conclusions of law and the said briefs having now been filed and the cause having been submitted to the Court for decision, the Court now being fully advised in the premises, makes the following as its

FINDINGS OF FACT

I.

That the plaintiff, Grass Creek Oil & Gas Company, is now and at all times mentioned in the plaintiffs' complaint, was a corporation, organized, existing and doing business under and by virtue of the laws of the State of Montana; that the defendant, Musselshell County, is a political subdivision of the State of Montana.

II.

That the plaintiffs, Grass Creek Oil & Gas Company and Elmer Hinton, claim an interest in and to the minerals in and under the following described lands, to-wit:

Five and one-half (5½) per cent of the royalty and

minerals in and under the S½ of the SW¼ and the NE¼ of the SW¼; and in the W½SE¼ of Section 24, Township 10 North, Range 26 East, Musselshell County, Montana;

that the claim of the plaintiff, Elmer Hinton, in and to the above described mineral and royalty interests is based in part upon a deed executed by the Bankers Farm Mortgage Company, a corporation, on the 28th day of March, 1942, to the said plaintiff, Elmer Hinton, purporting to convey to the said plaintiff some interest in and to the hereinabove described lands and premises.

III.

That heretofore and on the 7th day of August, 1947, in an action commenced in the above entitled Court by M. D. Staunton, as executor, said action being designated upon the docket and in the records of the above entitled Court as Cause No. 5258, judgment was duly entered, wherein and whereby it was ordered, adjudged and decreed, among other things, that the defendants in said action, Cause No. 5258, had no estate or interest whatsoever in and to the hereinabove described lands and premises, and other lands not involved in this action, or any part or portion thereof, or any lien or encumbrance thereon; that the Grass Creek Oil & Gas Company, one of the plaintiffs herein, and the Bankers Farm Mortgage Company, among others, were named as defendants in said action, Cause No. 5258, and were duly and regularly served with process therein; that the said judgment entered in said action, Cause No. 5258, has not been reversed, modified or set aside and that the said judgment is valid and regular in all respects and is binding upon the parties thereto, including the said Bankers Farm Mort-

gage Company and the said Grass Creek Oil & Gas Company.

IV.

That the plaintiff, Elmer Hinton, acquired no interest or claim of any nature in and to the hereinabove described lands and premises by virtue of the conveyance hereinabove mentioned from the Bankers Farm Mortgage Company to the said plaintiff, bearing date of March 28th, 1949, nor by virtue of any conveyance or conveyances which said plaintiff may have from any person who was named as a defendant in the hereinabove mentioned action, Cause No. 5258, and which was executed subsequent to the 7th day of August, 1947.

V.

That heretofore and on the 30th day of January, 1950, in an action commenced in the above entitled Court by Elmer Hinton, one of the plaintiffs herein, said action being designated on the docket and in the records of this Court as Cause No. 5342, judgment was duly entered by which it was ordered, adjudged and decreed, among other things, that the said Elmer Hinton, had no right, title, interest or estate in or to any of the oil, gas, or other minerals lying in, under or beneath or produced or saved from the hereinabove described lands and premises and other lands not involved in this action; that by said judgment the said Elmer Hinton is perpetually enjoined and restrained from asserting any right, title, interest or estate in or to said oil or gas or other minerals.

VI.

That, among others, the plaintiff Grass Creek Oil & Gas Company, as named as a defendant in said action, Cause No. 5342; that the said Grass Creek Oil & Gas

Company was duly and regularly served with process in said action, Cause No. 5342; that by the judgment duly and regularly entered in said action, as aforesaid, it was ordered, adjudged and decreed that the plaintiff, Grass Creek Oil & Gas Company, defendant in said action, had no right, title, estate or interest of any nature whatsoever in and to the lands and premises hereinabove described and other lands not here involved; that by the said judgment entered as aforesaid in said action, Cause No. 5342, the said Grass Creek Oil & Gas Company is perpetually enjoined and restrained from asserting any interest, claim to or encumbrance or lien upon the hereinabove described lands and premises and other lands not here involved, or any right, title, interest or estate in and to the oil and gas or other minerals therein and thereunder.

VII.

That the said plaintiff, Elmer Hinton, took an appeal from the said judgment entered as aforesaid in the said action, Cause No. 5342, to the Supreme Court of the State of Montana; that the said judgment was affirmed by the said Supreme Court of the State of Montana; that the said judgment has never been modified or set aside and is valid and regular in all respects and findings upon the parties thereto, including plaintiffs herein; that the said plaintiff, Elmer Hinton, has not proven nor attempted to prove that he has any right, title or interest in or to the hereinbefore described lands and premises, acquired subsequent to the entry of judgment in said Cause No. 5342.

VIII.

That heretofore in an action commenced in the above entitled Court by the Grass Creek Oil & Gas Company, one of the plaintiffs herein, said action being designated

on the docket and in the records of this Court as Cause No. 5406, judgment was duly and regularly entered by which it was ordered, adjudged and decreed, among other things, that the said Grass Creek Oil & Gas Company had no interest in or to any of the oil and gas or other minerals in and under the hereinabove described lands and premises; that the said plaintiff, Grass Creek Oil & Gas Company took an appeal from the said judgment entered as aforesaid in the said action, Cause No. 5406, to the Supreme Court of the State of Montana; that the said judgment was affirmed by the said Supreme Court of the State of Montana; that the said judgment has never been modified or set aside and is valid and regular in all respects and binding upon the parties thereto, including the plaintiff, Grass Creek Oil & Gas Company; that the said plaintiff, Grass Creek Oil & Gas Company, has not proven or attempted to prove that it has any right, title or interest in or to the hereinbefore described lands and premises, acquired subsequent to the entry of judgment in said Cause No. 5406.

IX.

That more than ten years prior to the commencement of this action conveyances were executed and duly recorded purporting to convey the interests in the hereinabove described premises claimed by the plaintiffs to predecessors in interest of the defendants herein; that said conveyances were duly and regularly filed and recorded more than ten years prior at the commencement of this action; that plaintiffs have made no attempt within the ten (10) years after the execution and recording of said conveyances to have said conveyances cancelled, annulled, declared void or set aside.

X.

That the aforesaid claims of the plaintiffs herein and to the lands hereinabove described are without any foundation, right or validity whatsoever.

XI.

That each of the defendants, J. A. Freibert, Frances Drake O'Neill and Althea V. Maris, own and are entitled to the possession of an undivided one (1) per cent interest in and to all of the oil and gas, saved and marketed from and under the hereinabove described lands.

XII.

That the defendant, Musselshell County, a political subdivision of the State of Montana, owns and is entitled to the possession of a two and one-half (2½) per cent interest in and to all of the oil and gas saved and marketed from the hereinabove described lands and premises.

From the foregoing Findings of Fact, the Court makes the following as its

CONCLUSIONS OF LAW

I.

That the plaintiffs herein are estopped and barred from asserting the interest in and to the hereinabove described lands which they seek to assert in this action.

II.

That the plaintiffs herein have no right, title, interest or estate in and to any of the oil, gas or other minerals lying in, under or beneath or produced or saved from the lands and premises hereinabove described and that plaintiffs are not entitled to any relief in this action.

III.

That each of the defendants, J. A. Freibert, Frances Drake O'Neill and Althea V. Maris, own and are entitled

to the possession of an undivided one (1) per cent interest in and to all of the oil and gas, saved and marketed from the under and hereinabove described lands.

IV.

That the defendant, Musselshell County, a political subdivision of the State of Montana, owns and is entitled to the possession of two and one-half (2½) per cent interest in and to all of the oil and gas saved and marketed from the hereinabove described lands and premises.

V.

That the defendants herein are entitled to judgment quieting their title to the above mentioned mineral interests owned by them against any claim or claims of the plaintiffs, and perpetually enjoining and restraining the plaintiffs from asserting any claim or claims adverse to or inconsistent with the said interests owned by the defendants as aforesaid, and granting to the said defendants their costs of suit herein expended.

Let Judgment be entered accordingly.

Dated this 16th day of February, 1953.

C. F. HOLT,
District Judge.

APPENDIX C

IN THE DISTRICT COURT OF THE FOURTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF MUSSELSHELL

GRASS CREEK OIL & GAS COMPANY, a corporation,

Plaintiff,

vs.

MUSSELSHELL COUNTY, MONTANA, a political subdivision of the State of Montana; THE ROMAN CATHOLIC BISHOP OF THE DIOCESE OF GREAT FALLS, MONTANA, a corporation sole; THE TEXAS COMPANY, a corporation; M. D. STAUNTON, Executor of the Last Will and Testament of John Whelan, deceased; REV. FATHER JOHN T. LAWLOR; JAMES A. LIGGETT; THE COMMUNITY OF SISTERS OF THE HOLY FAMILY OF NAZARETH, a corporation; JOHN CLARENCE McKENNA; AGNES LUCILLE McKENNA; ELIZABETH MARGARET McKENNA; SHARON FRANCES O'NEILL; KATHLEEN LOUISE O'NEILL; ELMER HINTON; and all other persons unknown, claiming or who might claim any right, title, estate or interest in, or lien or encumbrance upon, the real property described in the Complaint, or any thereof, adverse to Plaintiff's ownership, or any cloud upon Plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued,

Defendants.

11. That there are no oil or gas wells on the lands described in plaintiff's complaint, and there has been no

development thereof for oil, gas, or any other mineral.

Dated at Roundup, Montana, this 23rd day of January, 1950.

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF MONTANA

ELMER HINTON,

Plaintiff and Appellant,

vs.

M. D. STAUNTON, the appointed and acting Executor of the Estate of John Whelan, deceased; JAMES A. LIGGETT; JOHN CLARENCE McKENNA; AGNES LUCILLE McKENNA; ELIZABETH MARGARET McKENNA; SHARON FRANCES O'NEILL; KATHLEEN LOUISE O'NEILL; Jane Doe, otherwise known as MRS. ARTHUR C. GREER; IRA R. TABOR and MRS. IRA R. TABOR, his wife, if any; W. C. SCOTT and MRS. W. C. SCOTT, his wife, if any; FRED W. KROGER and MRS. FRED W. KROGER, his wife, if any; E. L. HENDRIX and ANNA F. HENDRIX, his wife, if any; H. F. WHITMAN and NONA WHITMAN, his wife; JOHN D. WILKIE, also known as J. D. WILKIE, and MRS. JOHN D. WILKIE, his wife; if any; A. J. LEONARD and MRS. A. J. LEONARD, his wife, if any; CLARENCE E. NEWMAN and MRS. CLARENCE E. NEWMAN, his wife, if any; G. W. MALLOUGH and MRS. G. W. MALLOUGH, his wife; META R. KORTEN; WILLIAM K. FAST; ORION K. KIEL and MRS. ORION K. KIEL, his wife, if any; ARTHUR H. EBELING; THE BANKERS FARM MORTGAGE COMPANY, a corporation; THE VICTORY OIL COMPANY OF ROUNDUP, MONTANA, a corporation; GRASS CREEK OIL & GAS COMPANY, a corporation; THE FIRST NATIONAL BANK OF ROUNDUP, MONTANA, a

corporation; COUNTY OF MUSSELSHELL, a political subdivision of the State of Montana; ROMAN CATHOLIC BISHOP, DIOCESE OF GREAT FALLS, MONTANA, a corporation; REV. FATHER JOHN T. LAWLOR; COMMUNITY OF SISTERS OF THE HOLY FAMILY OF NAZARETH, a corporation; and all other persons unknown, claiming or who might claim any right, title, estate or interest in, or lien or encumbrance upon the real property described in the complaint, or any part thereof, adverse to plaintiff's ownership or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued,

Defendants and Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action having come on regularly for trial on the 12th day of July, 1949, before the Court, sitting without a jury, and the plaintiff being present in person and by his attorneys, G. J. Jeffries and W. B. Leavitt; and the defendant, Musselshell County, Montana, appearing by its County Attorney, A. G. McNaught; and the defendants, E. E. Hendrix and Anna F. Hendrix, appearing by their attorney, E. G. Tooney; and the defendant, Grass Creek Oil & Gas Company, a corporation, appearing by its attorney, E. K. Cheadle; and the defendants W. C. Scott and Mrs. W. C. Scott, appearing by their attorneys, Schallenberger & Paddock; and the other defendants, M. D. Staunton, as Executor of the Estate of John Whelan, deceased; James A. Liggett; Clarence McKenna, as guardian ad litem for John Clarence McKenna; Elizabeth Margaret McKenna and Agnes Lucille McKenna, minors; P. T. O'Neill, as guardian ad

litem for Sharon Frances O'Neill and Kathleen Louise O'Neill, minors; Roman Catholic Bishop, Diocese of Great Falls, Montana, a corporation; Rev. Father John T. Lawler; Community of Sisters of the Holy Family of Nazareth, a corporation, appearing by their attorneys, C. F. Maris, W. W. Mercer, W. S. Mather and Ralph J. Anderson; and evidence, both oral and documentary, having been received and each of the parties hereto having filed herein briefs and proposed findings of fact and conclusions of law, and the cause having then been submitted to the Court for decision, and the Court now being fully advised in the premises, makes its Findings of Fact and Conclusions of Law as follows:

1. That on April 21, 1915, the Southwest quarter of Section Twenty-four, Township Ten North, Range Twenty-six East, Musselshell County, Montana, was patented to William H. Brown. That on December 9, 1919, William H. Brown mortgaged said lands to the Bankers Farm Mortgage Company, which said mortgage was duly recorded on January 10, 1920. That on May 11, 1920, William H. Brown conveyed to W. C. Scott and Fred W. Kroger all oil, gas, hydrocarbons and all other minerals in the Northwest quarter of the Southwest quarter of said Section Twenty-four, together with the right of entry hereon for development thereof, which said conveyance was recorded on May 17, 1920, in the official records of Musselshell County, Montana. That on September 30, 1920, William H. Brown conveyed an undivided one-half interest in and to all oil, gas and other minerals in and under the South half of the Southwest quarter, and Northeast quarter of the Southwest quarter of said Section Twenty-four, together with right of entry, to B. B. Brooks

and C. B. Richardson, trustees, who thereafter on October 6, 1920, conveyed said interest in said lands to Grass Creek Oil & Gas Company. That on January 19, 1921, William H. Brown conveyed a 1¼% royalty interest in the South half of the Southwest quarter, and the Northeast quarter of the Southwest quarter of Section Twenty-four, to E. L. Hendrix, who thereafter conveyed a three-fourths of one per cent therein to others.

2. That on June 26, 1922, Bankers Farm Mortgage Company commenced a foreclosure action upon its mortgage in the District Court of Musselshell County, Montana, wherein William H. Brown, W. C. Scott, Fred Kroger, Grass Creek Oil & Gas Company, and E. L. Hendrix and others, were joined as parties defendant, and after proceedings were had in said action, and on March 6, 1923, a judgment and decree of foreclosure in favor of plaintiff was made and entered in said action; that pursuant to an order of sale issued under said judgment the Southwest quarter of said Section Twenty-four was sold at Sheriff's sale to Bankers Farm Mortgage Company and Sheriff's Certificate of Sale dated April 7, 1923, was issued to said purchaser and a duplicate thereof was filed in the office of the County Clerk and Recorder of Musselshell County, Montana; that thereafter on January 7, 1949, a Sheriff's deed was issued upon said certificate of sale to the said Bankers Farm Mortgage Company, a corporation.

That the judgment roll and record in said foreclosure action disclosed that E. L. Hendrix was personally served with summons; that no valid service of summons was made upon the defendants therein, Grass Creek Oil & Gas Company, W. C. Scott and Fred W. Kroger; that William

H. Brown was duly served with summons by publication. That no affidavit of mailing of copies of the summons and complaint to William H. Brown appears in the judgment roll and record.

3. That said Southwest quarter of said Section Twenty-four was sold to Musselshell County, Montana, for delinquent taxes for the year 1921, and a tax sale certificate was issued to said county on January 21, 1922.

That neither the undivided one-half interest in the oil, gas, and other minerals in said lands, nor the right to enter thereon for development, conveyed to Grass Creek Oil & Gas Company were separately assessed or separately taxed.

That neither the oil, gas, hydrocarbons and other minerals in said lands, nor the right to enter thereon for development, conveyed to W. C. Scott and Fred W. Kroger, were separately assessed or separately taxed.

That on October 17, 1927, tax deed to the said Southwest quarter was issued to Musselshell County. That on August 3, 1938, Musselshell County conveyed said lands to John Whelan, pursuant to a contract entered into in 1933, the County reserving an undivided two and one-half per cent mineral interest in said lands, said conveyance being duly recorded on April 4, 1939.

That on March 28, 1949, plaintiff procured a conveyance describing said lands from The Bankers Farm Mortgage Company.

4. That patent issued to Harry C. Brown on April 21, 1914, to the West half of the Southwest quarter of Section Twenty-four, Township Ten North, Range Twenty-six East, Musselshell County, Montana. That on September 30, 1920, Harry C. Brown conveyed an undivided

one-half interest in and to all oil, gas and other hydrocarbons, and minerals in and under said lands, together with right of entry, to B. B. Brooks and C. B. Richardson, trustees, who in turn on October 6, 1920, conveyed said interest in said lands to the Grass Creek Oil & Gas Company.

That on September 30, 1921, Harry C. Brown mortgaged said land to the First National Bank of Roundup, Montana. That said mortgagee on November 1, 1922, commenced suit against Harry C. Brown and wife to foreclose said mortgage, decree of foreclosure being duly entered on January 12, 1923, and on February 17, 1923, said lands were sold on foreclosure to The First National Bank of Roundup, and Sheriff's Certificate of Sale was issued to said bank on February 17, 1923. That there is no evidence proving or tending to prove, that any redemption was made from said Sheriff's sale.

On January 21, 1920, said lands were struck off to Musselshell County, Montana, for taxes delinquent for the year 1919, assessed to Harry C. Brown, and Certificate of Tax Sale issued to the County, August 17, 1920.

That the oil, gas and other minerals in said land and the right to enter thereon conveyed to Grass Creek Oil & Gas Company were never separately assessed or separately taxed.

That thereafter, a tax deed to said lands was issued to Musselshell County, Montana, on February 16, 1929.

That on August 3, 1938, Musselshell County conveyed said lands to John Whelan, pursuant to a contract entered into in 1933, the County reserving an undivided two and one-half per cent mineral interest in said lands, said conveyance being duly recorded on April 4, 1939.

That on May 6, 1949, and on June 24, 1949, quit claim deeds covering said lands were executed by Catherine Brown Moffett and Della R. Brown, heirs of Harry C. Brown, to plaintiff.

That on February 29, 1944, John Whelan agreed to sell and the plaintiff agreed to buy all of the lands above described, reserving however in Whelan all oil and gas rights together with the right to enter, explore, mine and remove such oil and gas and to use such surface as may be necessary therefor.

That immediately upon the execution of said contract for deed, and by virtue of and pursuant to the terms and conditions of said contract, plaintiff *entered into possession of the lands described in the complaint herein and ever since that time he has been in possession thereof, under said contract and not otherwise, and since the year 1944, has paid the taxes levied and assessed thereon.*

CONCLUSIONS OF LAW

1. That the tax deed purporting to convey the Southwest quarter of Section Twenty-four, Township Ten North, of Range Twenty-six East to Musselshell County, Montana, was invalid and of no legal effect, and that Musselshell County acquired no right, title or interest in said lands through said tax deed.

2. That the judgment and decree in the action foreclosing the real estate mortgage of Bankers Farm Mortgage Company was void and of no effect as to the defendant Grass Creek Oil & Gas Company, and its undivided one-half interest in the oil, gas and other minerals in and under the South half of the Southwest quarter and the Northeast quarter of the Southwest quarter of Section Twenty-four, and was void and of no effect as to the

interest of the defendant W. C. Scott and his interest in the oil, gas, hydrocarbons and other minerals in and under the Northwest quarter of the Southwest quarter of said Section Twenty-four.

That the judgment of foreclosure made and entered in the case of Bankers Farm Mortgage Company, a corporation, versus William H. Brown and others, was a valid and legal judgment against the said William H. Brown and the defendant, E. L. Hendrix, and the Sheriff's deed issued to the said Bankers Farm Mortgage Company pursuant to said judgment vested in said grantee all of the right, title and interest of the said William H. Brown and E. L. Hendrix in and to said Southwest quarter of said Section Twenty-four.

3. That the defects and irregularities in the tax deed proceedings as to the Southwest quarter of Section Twenty-four, Township Ten North, Range Twenty-six East, are not cured by subsequent curative acts.

4. That the tax deed proceedings relative to the West half of the Southeast quarter of Section Twenty-four, Township Ten North, Range Twenty-six West, are good and valid in all respects. That all outstanding mineral and royalty interests in said lands were cut off by said tax deeds.

APPENDIX E

IN THE DISTRICT COURT OF THE FOURTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF MUSSELSHELL

NO. 5258

M. D. STAUNTON, as Executor of the Estate of John Whelan, Deceased,

Plaintiff,

vs.

IRA R. TABOR and MRS. IRA R. TABOR, his wife, if any; W. C. SCOTT and MRS. W. C. SCOTT, his wife, if any; FRED W. KROGER and MRS. FRED W. KROGER, his wife, if any; E. L. HENDRIX and ANNA F. HENDRIX, his wife; H. E. WHITMAN and NONA WHITMAN, his wife; JOHN D. WILKIE, also known as J. D. WILKIE, and MRS. JOHN D. WILKIE, his wife, if any; A. J. LEONARD and MRS. A. J. LEONARD, his wife, if any; CLARENCE W. NEWMAN and MRS. CLARENCE E. NEWMAN, his wife, if any; G. W. MALLOUGH and MRS. G. W. MALLOUGH, his wife; META R. KORTEN; JOHN J. O'FALLON; WILLIAM K. FAST; ORION K. KIEL and MRS. ORION K. KIEL, his wife, if any; ARTHUR H. EBELING; CATHERINE BROWN MOFFETT; THE BANKERS FARM MORTGAGE COMPANY, a corporation; THE VICTORY OIL COMPANY OF ROUNDUP, MONTANA, a corporation; GRASS CREEK OIL & GAS COMPANY, a corporation; THE FIRST NATIONAL BANK OF ROUNDUP, MONTANA, a corporation; the unknown heirs and devisees of WILLIAM H. BROWN, deceased; the unknown heirs and devisees of HARRY C. BROWN, also known as H. C. Brown, deceased; and all other persons unknown, claim-

ing or who might claim any right, title, estate or interest in or lien or encumbrance upon the real property described in the complaint, or any part thereof, adverse to plaintiff's ownership or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued,

Defendants.

COMPLAINT

Plaintiff complaints and alleges:

I.

That said plaintiff is the duly appointed, qualified and acting executor of the estate of John Whelan, deceased.

II.

That the said defendant, The Bankers Farm Mortgage Company, a corporation, now is and at all times herein mentioned was a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota and duly and regularly licensed to do business in the State of Montana.

III.

That the said defendant, The First National Bank of Roundup, Montana, a corporation, was a banking corporation organized, existing and doing business under and by virtue of the laws of the United States of America, but that said defendant failed and was duly and regularly liquidated as provided by law in such matters.

IV.

That the said defendant, Grass Creek Oil & Gas Company, a corporation, now is, and at all times herein mentioned was a corporation organized, existing and doing business under and by virtue of the State of Montana.

V.

That the above mentioned John Whelan, deceased, for a long period of time before his decease had been, and at the time of his decease was the owner of and in the actual, notorious and undisputed possession of the following described real estate, lying and being in the County of Musselshell, State of Montana, to-wit:

The Southwest quarter (SW¼), and the West one-half of the Southeast quarter (W½SE¼) of Section Twenty-four (24), Township Ten (10) North, Range Twenty-six East of the Montana Meridian; and, Section Twenty (20) and the South one-half of the Northeast quarter (S½NE¼) of Section Thirty (30), all in Township Ten (10) North, Range Twenty-seven (27) East of the Montana Meridian.

subject, however, to certain oil and gas royalties which said deceased had sold and conveyed to Frances Drake O'Neill, J. A. Freibert and C. F. Maris, certain reservations of oil, gas and mineral rights in a part of said premises made by the said County of Musselshell, Montana, and a contract for deed which said deceased had made, executed, and delivered to one Elmer Hinton; and, that ever since the decease of the said John Whelan, the said real estate has been and now is the property of the said estate of John Whelan, deceased, subject to the exceptions and property rights above mentioned.

VII.

That said plaintiff has attempted to find the names of the heirs and devisees, if any, of William H. Brown, deceased, and Harry C. Brown, also known as H. C. Brown, deceased, each of whom at one time claimed, or might have claimed some right, title, claim or interest in or to said real estate hereinabove described, or some part

thereof, and that the heirs and devisees of said deceased persons, and each of them, have not been judicially determined, so far as said plaintiff has been able to learn.

VIII.

That the persons above named as defendants in the caption and heading of this complaint and each and all thereof, claim an estate or interest in, or lien or encumbrance upon the said real estate above described, or some part thereof, adverse to the plaintiff's estate and interest in said real property, but that the claim or claims of said defendants, and each and all of them, are without any foundation, right or validity whatsoever, and that none of said defendants have any right, title, or interest in or lien or encumbrance upon, in or to said lands and premises hereinabove described, or any part thereof.

IX.

That said plaintiff has endeavored to ascertain and has used all reasonable diligence in his endeavors to ascertain the name or names of all persons claiming or who might claim any right, title, estate or interest in or lien or encumbrance upon said above described real estate, or any part thereof, adverse to said estate's ownership thereof or any cloud upon said estate's title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued; that said plaintiff has been unable to find or learn of any such persons other than those specifically named as defendants herein, but should any such person or persons exist who now assert or who might assert any such claim or claims, plaintiff alleges that such claim or claims are each and all without any foundation, right or validity

whatsoever, and each and all are inferior and subservient to the claim of said estate.

X.

That the plaintiff herein desires to obtain a complete adjudication of the title to the real estate hereinabove described as provided by the laws of the State of Montana in such matters.

WHEREFORE, Plaintiff prays judgment as follows:

1. That the said defendants, and each of them, including any and all persons, known or unknown, who assert or might assert any claim or claims in or to the above described real estate, be required to appear in this action and set forth any claims or interest whatsoever which they or any of them might assert herein, and that by proper decree this Court adjudged that the above named defendants, and each of them, and any and all persons claiming by, through or under them, or any or either of them, including any and all persons unknown, who claim or may claim any right, title, estate or interest in, or lien or encumbrance upon the lands and premises hereinbefore described, adverse to the ownership of said estate, or any cloud upon said estate's title to the said lands and premises, save and except the interests hereinbefore mentioned, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued, have, and each of them has, no estate or interest whatsoever in said lands or premises, or any part or portion thereof, or any lien or encumbrance thereon;

2. That the Court adjudge and decree that the said estate of John Whelan, deceased, is the owner in fee simple of said above described real estate and premises, free

and clear of all claims, demands, liens and encumbrances, save and except the royalty claims above mentioned of Frances Drake O'Neill, J. A. Freibert, C. F. Maris, the oil, gas and mineral reservations of record in favor of the County of Musselshell, State of Montana, and the contract for deed to Elmer Hinton above mentioned.

3. That the plaintiff do have and recover of and from any answering defendant, his costs and disbursements incurred in and by reason of this action; and,

4. For such other and further relief as to the Court may seem meet and equitable herein.

C. F. MARIS,
Attorney for Plaintiff.

APPENDIX F

IN THE DISTRICT COURT OF THE FOURTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF MUSSELSHELL

NO. 5258

M. F. STAUNTON, as Executor of the Estate of John Whelan, Deceased,

Plaintiff,

vs.

IRA R. TABOR and MRS. IRA R. TABOR, his wife, if any; W. C. SCOTT and MRS. W. C. SCOTT, his wife, if any; FRED W. KROGER and MRS. FRED W. KROGER, his wife, if any; E. L. HENDRIX and ANNA F. HENDRIX, his wife; H. F. WHITMAN and NONA WHITMAN, his wife; JOHN D. WILKIE, also known as J. D. WILKIE, and MRS. JOHN

D. WILKIE, his wife, if any; A. J. LEONARD and MRS. A. J. LEONARD, his wife, if any; CLARENCE W. NEWMAN and MRS. CLARENCE E. NEWMAN, his wife, if any; G. W. MALLOUGH and MRS. G. W. MALLOUGH, his wife; META R. KORTEN; JOHN J. O'FALLON; WILLIAM K. FAST; ORION K. KIEL and MRS. ORION K. KIEL, his wife, if any; ARTHUR H. EBELING; CATHERINE BROWN MOFFETT; THE BANKERS FARM MORTGAGE COMPANY, a corporation; THE VICTORY OIL COMPANY OF ROUNDUP, MONTANA, a corporation; GRASS CREEK OIL & GAS COMPANY, a corporation; THE FIRST NATIONAL BANK OF ROUNDUP, MONTANA, a corporation; the unknown heirs and devisees of WILLIAM H. BROWN, deceased; the unknown heirs and devisees of HARRY C. BROWN, also known as H. C. BROWN, deceased; and all other persons unknown, claiming or who might claim any right, title, estate or interest in or lien or encumbrance upon the real property described in the complaint, or any part thereof; adverse to plaintiff's ownership or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued,

Defendants.

JUDGMENT AND DECREE

This cause coming on regularly to be *heard* on the 7th day of August, 1947, and the plaintiff appearing by his counsel, C. F. Maris, and it being proved to the satisfaction of the Court that the defendants, and each of them, have been duly served with process and summons herein and that they, and all of them, have failed to appear or answer herein within the time provided by law and that their defaults have been duly and regularly entered herein, and it further appearing that an affidavit of non military

service has been filed herein, the Court now proceeds to examine the complaint filed herein and to hear the evidence in said action, and after the evidence has been introduced and the Court having heard the same and it appearing that all of the defendants have been served in the manner as prescribed by law, does now find:

I.

That said plaintiff is the duly appointed, qualified and acting executor of the estate of John Whelan, deceased.

II.

That the said defendant, The Bankers Farm Mortgage Company, a corporation, now is and at all times herein mentioned was a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota and duly and regularly licensed to do business in the State of Montana.

III.

That the said defendant, The First National Bank of Roundup, Montana, a corporation, was a banking corporation organized, existing and doing business under and by virtue of the laws of the United States of America, but that said defendant failed and was duly and regularly liquidated as provided by law in such matters.

IV.

That the said defendant, Grass Creek Oil & Gas Company, a corporation, now is, and at all times herein mentioned was a corporation organized, existing and doing business under and by virtue of the State of Montana.

V.

That the above mentioned John Whelan, deceased, for a long period of time before his decease had been, and at the time of his decease was the owner of and in the

actual, notorious and undisputed possession of the following described real estate, lying and being in the County of Musselshell, State of Montana, to-wit:

The Southwest quarter (SW¼) and the West one-half of the Southeast quarter (W½SE¼) of Section Twenty-four (24), Township Ten (10) North, Range Twenty-six (26) East of the Montana Meridian; and, Section Twenty (20) and the South one-half of the Northeast quarter (S½NE¼) of Section Thirty (30), all in Township Ten (10) North, Range Twenty-seven (27) East of the Montana Meridian,

subject, however, to certain oil and gas royalties which said deceased had sold and conveyed to Frances Drake O'Neill, J. A. Freibert and C. F. Maris, certain reservations of oil, gas and mineral rights in a part of said premises made by the said County of Musselshell, Montana, and a contract for deed which said deceased had made, executed and delivered to one Elmer Hinton; and, that ever since the decease of the said John Whelan, the said real estate has been and now is the property of the said estate of John Whelan, deceased, subject to the exceptions and property rights above mentioned.

VII.

That said plaintiff has attempted to find the names of the heirs and devisees, if any, of William H. Brown, deceased, and Harry C. Brown, also known as H. C. Brown, deceased, each of whom at one time claimed, or might have claimed some right, title, claim or interest in or to said real estate hereinabove described, or some part thereof, and that the heirs and devisees of said deceased persons, and each of them, have not been judicially determined, so far as said plaintiff has been able to learn.

VIII.

That the persons above named as defendants in the caption and heading of this complaint and each and all ther of, claim an estate or interest in, or lien or encumbrance upon the said real estate above described, or some part thereof, adverse to the plaintiff's estate and interest in said real property, but that the claim or claims of said defendants, and each and all of them, are without any foundation, right or validity whatsoever, and that none of said defendants have any right, title or interest in or lien or encumbrance upon, in or to said lands and premises hereinabove described, or any part thereof.

IX.

That said plaintiff has endeavored to ascertain and has used all reasonable diligence in his endeavors to ascertain the name or names of all persons claiming or who might claim any right, title, estate or interest in or lien or encumbrance upon said above described real estate, or any part thereof, adverse to said estate's ownership thereof or any cloud upon said estate's title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued; that said plaintiff has been unable to find or learn of any such persons other than those specifically named as defendants herein, but should any such person or persons exist who now assert or who might assert any such claim or claims, plaintiff alleges that such claim or claims are each and all without any foundation, right or validity whatsoever and each and all are inferior and subservient to the claim of said estate.

X.

That a Lis Pendens was duly filed in the office of the

County Clerk of Musselshell County at the same time the above entitled action was commenced.

That the Court further finds that each and all of the allegations of plaintiff's complaint on file herein are true and correct and that by reason of the above Findings of fact the Court now makes the following Conclusions of Law:

I.

That due and legal service has been made upon all the defendants named in said action and that the default of the said defendants has been duly and regularly entered in said action.

II.

That the plaintiff is entitled to a judgment and decree against the defendants and all of them; that it be decreed, declared and adjudged that the defendants have no estate or interest whatsoever in or to said lands and premises herein described and that the title of the plaintiff is good and valid and that the plaintiff is the owner of said premises and entitled to possession thereof; that the plaintiff is entitled to a decree and judgment; that all of the defendants be forever barred from asserting any right, title, estate or interest, lien, claim or equity of redemption in or to the said lands and premises herein described adverse to the plaintiff and that the defendants be declared to have no estate or interest therein; that the plaintiff is entitled to a judgment and decree decreeing that the said estate of John Whelan, deceased, is the owner in fee simple of said above described real estate and premises, free and clear of all claims, demands, lien and encumbrances, save and except the royalty claims above mentioned of Frances Drake O'Neill, J. A. Freibert, C. F.

Maris, the oil, gas and mineral reservations of record in favor of the County of Musselshell, State of Montana, and the contract for deed to Elmer Hinton above mentioned.

NOW, THEREFORE, by reason of the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That the plaintiff have judgment as prayed for in his complaint, and IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the said defendants and each of them, including any and all persons, known or unknown, who assert or might assert any claim or claims in or to the above described real estate, and any and all persons claiming by, through or under them, or any or either of them, including any and all persons unknown, who claim or may claim any right, title, estate or interest in, or lien or encumbrance upon the lands and premises hereinbefore described, adverse to the ownership of said estate, or any cloud upon said estate's title to the said lands and premises, save and except the interests hereinbefore mentioned, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued, have, and each of them has, no estate or interest whatsoever in said lands or premises, or any part or portion thereof, or any lien or encumbrance thereon.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said estate of John Whelan, deceased, is the owner in fee simple of said above described real estate and premises, free and clear of all claims, demands, liens and encumbrances, save and except the royalty

claims above mentioned of Frances Drake O'Neill, J. A. Freibert, C. F. Maris, the oil, gas and mineral reservations of record in favor of the County of Musselshell, State of Montana, and the contract for deed to Elmer Hinton above mentioned.

That the lands and premises mentioned herein and described in the complaint herein are located in Musselshell County, Montana, and are described as follows, to-wit:

The Southwest quarter (SW¼) and the West one-half of the Southeast quarter (W½SE¼) of Section Twenty-four (24), Township Ten (10) North, Range Twenty-six (26) East of the Montana Meridian; and, Section Twenty (20) and the South one-half of the Northeast quarter (S½NE¼) of Section Thirty (30), all in Township Ten (10) North, Range Twenty-seven (27) East of the Montana Meridian,

subject, however, to certain oil and gas royalties which said deceased had sold and conveyed to Frances Drake O'Neill, J. A. Freibert, and C. F. Maris, certain reservations of oil, gas and mineral rights in a part of said premises made by the said County of Musselshell, Montana, and a contract for deed which said deceased had made, executed and delivered to one Elmer Hirton.

DATED this 7th day of August, A. D. 1937.

F. V. WATTS,
Judge.

APPENDIX G

Mr. Justice Angstman delivered the Opinion of the Court.

This action is one to remove clouds on five and one-half per cent royalty and mineral interest in and under the S½ of the SW¼ and the NE¼ of the SW¼, and to three per cent royalty interest in the W½ of the SE¼ of Section 24, Township 10 North, Range 26 East, in Musselshell County.

In controversy here is Musselshell County's claim to two and one-half per cent royalty and mineral interest in the SW¼ of Section 24 and the claim of each individual defendant to a one per cent royalty interest in all the land above described. Plaintiffs' position is that their rights rest upon conveyances from the original owners and their successors, while those of defendants are based on tax deeds to defendant county and conveyances from successors of the county. They contend that the tax deeds are void, and as to the SW¼ of Section 24 there has been judicial determination to that effect.

Defendants contend that it has already been judicially determined that plaintiffs have no right to the mineral interests here involved.

The court found that the claim of plaintiff Hinton is based in part upon a deed given by the Bankers Farm Mortgage Company to him dated March 28, 1949; that in an action commenced in Musselshell County on August 7, 1947, by Staunton, as executor of the estate of John Whelan, being Cause No. 5258, it was adjudicated that defendants in the action had no estate or interest in the SW¼ and the W½ of the SE¼ of Section 24, Township 10 North, Range 26 East; that plaintiffs Grass Creek

Oil & Gas Company and Bankers Farm Mortgage Company, among others, were defendants in that action and were duly and regularly served with process therein; that the judgment entered August 7, 1947, has not been reversed, modified or set aside and is therefore valid and binding upon the parties thereto. The judgment roll in Cause No. 5258, which was introduced in evidence here, sustains the findings of the court unless it can be said that process was not regularly served on Bankers Farm Mortgage Company or on Grass Creek Oil & Gas Company.

As to the Grass Creek Oil & Gas Company and Bankers Farm Mortgage Company the record shows service of process was had by serving a copy of the complaint and summons upon the secretary of state together with a copy of the order of the clerk of court directing that service be thus made. The secretary of state mailed the copy of the summons, complaint and order to each of such defendants at their principal office as shown by the papers on file in his office. This service was sufficient to obtain jurisdiction to enter judgment against the mortgage company and the Grass Creek Oil & Gas Company.

The judgment in Cause No. 5258 not only adjudicated that defendants therein have no right, title or interest in or lien or encumbrance upon the property or any part thereof, but adjudicated in line with the allegations of the complaint that plaintiff John Whelan was then the owner in fee simple of the property free and clear of all claims and demands save and except the royalty claims of Frances Drake O'Neill, J. A. Freibert, C. F. Maris, and the oil, gas and mineral reservations of record in favor of the County of Musselshell. Hinton was not a party to that

action but the Bankers Farm Mortgage Company, under whom he claims an interest in the SW¼ of Section 24, by deed of March 28, 1949, was a party defendant. Musselshell County was not a party to that action.

The court also found that on January 30, 1950, Elmer Hinton commenced action No. 5343 in Musselshell County, and that judgment therein determined that he had no right, title, interest or estate in or to any oil, gas or other minerals lying in or under, or produced or saved from the land here involved, and plaintiffs, Grass Creek Oil & Gas Company and Musselshell County, were named as defendants therein and duly served with process and that the judgment likewise determined that plaintiff Grass Creek Oil & Gas Company had no right, title, estate or interest in the lands here involved or in the oil, gas or other minerals therein or thereunder. This judgment was affirmed by this court. Hinton v. Staunton, 124 Mont. 534, 228 Pac. (2d) 461. The judgment roll in that case shows likewise that process was served on defendant Grass Creek Oil & Gas Company by service thereof upon the secretary of state.

The judgment in that action holds that the tax deed to the SW¼ of Section 24 was invalid and of no legal effect but that the tax title proceedings as to the W½ of the SE¼ of Section 24 were good and valid in all respects. It held that plaintiff Hinton, who was holding under a contract from John Whelan, is estopped to assert title adverse to the title of the estate of John Whelan; it held specifically that the Staunton quiet title action is valid and binding and res judicate against all parties from whom plaintiff claims by virtue of subsequent conveyances; that plaintiff has no right, title, interest or estate in or to any

of the oil, gas or other minerals lying in, under or beneath, or produced or saved from the lands and premises described in his complaint"; and that Musselshell County "is the owner of an undivided two and one-half per cent of all oil, gas, and other minerals lying in, under and beneath the SW¼ and the W½ of the SE¼ of Section 24."

In the case at bar the court also found that the Grass Creek Oil & Gas Company commenced action No. 5406 in Musselshell County against Musselshell County and Elmer Hinton, among others, and that judgment was entered therein by which it was determined that the Grass Creek Company and Elmer Hinton had no interest in or to any of the oil and gas or other minerals in and under the lands here involved; that judgment was entered in January, 1950; that an appeal was taken to this court and the judgment was affirmed. Grass Creek Oil & Gas Co. v. Musselshell County, 124 Mont. 594, 228 Pac. (2d) 968. The court in the case at bar concluded that plaintiffs are estopped and barred from asserting the claims to the land which they seek to assert; that each of the defendants, J. A. Freibert, Frances Drake O'Neill and Althea V. Maris, own an undivided one per cent interest in the oil and gas saved and marketed from the land, and that Musselshell County is entitled to two and one-half per cent of such oil and gas.

The judgment rendered in Cause No. 5258 holding as it did that the Bankers Farm Mortgage Company had no interest in the lands involved, that judgment was also binding and conclusive against Hinton who claims through that company by subsequent conveyance. 50 C.J.S., Judg-

ments § 787, p. 322; 30 Am. Jur., Judgments § 222, p. 954.

Plaintiffs contend that the court in the previous cases above referred to was lacking in jurisdiction particularly as to the SW¼ of Section 24 because it found the tax deed void, and it was therefore inconsistent to base rights on the deed.

It is our view that the court had jurisdiction in Cause No. 5258, and in the subsequent actions to determine the rights and interests of all parties to the actions. A wrong decision, if such it be, would constitute error within jurisdiction but not a want of jurisdiction. State ex rel. King v. District Court, 24 Mont. 494, 62 Pac. 820. Compare Cocanougher v. Mont. Life Ins. Co., 103 Mont. 536, 64 Pac. (2d) 845.

Nor is it of importance that in Hinton v. Staunton, 124 Mont. 534, 228 Pac. (2d) 461, this court held that the attack there made was a collateral attack. If the judgment in the Staunton action, No. 5258, was void for want of jurisdiction, and that a void judgment is always subject to collateral attack, as plaintiffs now contend, that same contention could and should have been made in the Hinton case which resulted in the appeal reported in 124 Mont. 534.

Counsel for plaintiffs point out that the individual defendants Freibert, O'Neill and Maris were not parties to any of the previous actions and that as to them none of the questions are res judicata. The interest of these three defendants is a one per cent royalty interest to each in and to all the oil and gas saved and marketed from the lands, which royalty interests were obtained by deeds from John Whelan.

In Rist v. Toole County, 117 Mont. 426, 159 Pac. (2d) 340, 162 A.L.R. 406, this court said:

"This court long ago adopted the standard and universal definition of royalty. In Hinerman v. Baldwin, 67 Mont. 417, 215 Pac. 1103, 1108, it said: 'The word has a very well understood and definite meaning in mining and oil operations. As thus used, it means a share of the produce or profit paid to the owner of the property. Webster's Dictionary.' The expression 'a share of the produce or profit paid to the owner of the property' is quite different from a share or interest in the property itself. It recognizes that the originator of the royalty is still the owner of the real property to which it relates, and that the assignee's interest is only in the 'produce or profit' therefrom—namely, in the personal property which the owner is to receive from the granted privilege of producing minerals from his land."

The court then, after referring to Homestake Exploration Corporation v. Schoregge, 81 Mont. 604, 264 Pac. 388, said:

"In that case this court pointed out that the royalty, whether of the kind known as landowner's royalty or that known as overriding royalty, constituted an interest in the privilege of producing minerals, and in the personal property when and as severed and produced from the land, but not an interest in the minerals in place; in other words, it is a privilege a prendre and not a portion of the fee-simple title. To the same effect is Broderick v. Stevenson Consolidated Oil Co., supra (88 Mont. 34, 290 Pac. 244)."

It follows that when Whelan conveyed the royalty interest to each of the individual defendants he retained ownership of the minerals and conveyed only a right o

share in the produce or profit therefrom. The deeds expressly covered production under the existing lease and also such leases "which may at any subsequent time be entered into or executed by Whelan, his heirs, executors, administrators, successors or assigns" and come squarely within the ruling of the Rist case that the grant of royalty under future leases is "inconsistent with an intention to convey part of the mineral title itself."

Here the individual defendants acquired their royalty interests from Whelan in 1943. Whelan's interest in the minerals was adjudicated by the judgments entered in the subsequent actions. Whether defendants were parties to those actions or not, the adjudication that Whelan held the title to the minerals was in effect an adjudication that the royalties which attach to the minerals were valid. The royalty interests could not be defeated without defeating the title to the minerals and this title has already been adjudicated against plaintiffs and in favor of Whelan's estate.

Contention is made that appellants have been denied rights of due process of law under section 27 of Article III of the Constitution of Montana and under the Fifth Amendment to the United States Constitution. They were given an opporunity to be heard and that meets the requirement of due process. Mitchell v. Banking Corp. of Mont., 94 Mont. 183, 22 Pac. (2d) 155. The gas company was a party to all three cases and the Bankers Farm Mortgage Company, through which Hinton claims, was afforded an opportunity to be heard in case No. 3258. And if the decisions were erroneous, as plaintiffs contend, they still did not deprive them of property without due

process of law. American Ry. Express Co. v. Kentucky, 273 U.S. 269, 71 L. Ed. 639.

The judgment is affirmed.

ALBERT H. ANGSTMAN,
Associate Justice.

I concur:

R. V. BOTTOMLY,
Associate Justice.

Mr. Chief Justice Adair concurring in the result:

I concur in affirming the judgment of the district court but do not agree with all that is said in the foregoing opinion.

HUGH ADAIR,
Chief Justice.

I dissent:

FORREST H. ANDERSON,
Associate Justice.

APPENDIX H

IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. 9338

GRASS CREEK OIL & GAS COMPANY, a corporation, and ELMER HINTON,

Plaintiffs and Appellants,

vs.

MUSSELSHELL COUNTY, MONTANA, a political subdivision of the State of Montana; J. A. FREIBERT, FRANCIS DRAKE O'NEILL, ALTHEA V. MARIS and THE TEXAS COMPANY, a corporation,

Defendants and Respondents.

ORDER

Appellants' petition for a rehearing herein is hereby denied.

Dated this 1st day of March, 1957.

ALBERT H. ANGSTMAN,
R. V. BOTTOMLY,
HUGH ADAIR,
Associate Justices.

SUPREME COURT U.S.
AUG
JOHN T. FEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 523

GRASS CREEK OIL & GAS COMPANY, a corporation, and ELMER HINTON, *Petitioner,*

vs.

MUSSELSHELL COUNTY, MONTANA, a political subdivision of the State of Montana; J. A. FREIBERT, FRANCIS DRAKE O'NEILL, ALTHEA V. MARIS *and* THE TEXAS COMPANY, a corporation, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR J. A. FREIBERT, FRANCIS DRAKE O'NEILL AND ALTHEA V. MARIS IN OPPOSITION

W. S. MATHER,
P. O. Box 1067
Roundup, Montana

RALPH J. ANDERSON,
STANLEY P. SORENSON,
517 Power Block
P. O. Box 235
Helena, Montana
Of Counsel

MYLES J. THOMAS,
517 Power Block
P. O. Box 252
Helena, Montana
Attorney for Respondents,
J. A. Freibert, Francis Drake O'Neill and Althea V. Maris.

INDEX

	Pages
Statement	2- 4
Argument	4-14
Conclusion	14-15

TABLE OF CASES CITED

American Ry. Express Co. vs. Commonwealth of Kentucky,
47 Sup. Ct. 353, 273 U.S. 269, 71 L. Ed. 639 — 5

Aronow vs. Bishop,
107 Mont. 317, 86 Pac. (2d) 644 — 11

Blaser vs. Clinton Irrigation District et. al.,
108 Mont. 287, 89 Pac. (2d) 1022 — 8

Coconouger vs. MontanaLife Ins. Co. et. al.,
103 Mont. 536, 64 Pac. (2d) 845 — 6

Conway et. al. vs. Fabian et. al.,
108 Mont. 287, 89 Pac. (2d) 1022 — 8

Galiger et. al. vs. McNulty et. al.,
80 Mont. 339, 260 Pac. 401 — 8

Grass Creek Oil and Gas Co. vs. Musselshell County et. al.,
124 Mont. 594, 228 Pac. (2d) 968 — 4

Hinton et. al. vs. Staunton et. al.,
124 Mont. 534, 228 Pac. (2d) 461 — 3-14

McAlpin vs. Smith,
123 Mont. 391, 213 Pac. (2d) 602 — 11

Mitchell vs. Banking Corp. of Mont.,
94 Mont. 183, 22 Pac. (2d) 155 — 4

Rist vs. Toole County,
117 Mont. 426, 159 Pac. (2d) 340 — 9-11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 323

GRASS CREEK OIL & GAS COMPANY, a corporation, and ELMER HINTON,

Petitioner,

vs.

MUSSELSHELL COUNTY, MONTANA, a political subdivision of the State of Montana; J. A. FREIBERT, FRANCIS DRAKE O'NEIEL, ALTHEA V. MARIS *and* THE TEXAS COMPANY, a corporation.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR J. A. FREIBERT, FRANCIS DRAKE O'NEILL AND ALTHEA V. MARIS IN OPPOSITION

STATEMENT

We find the pettion of the Grass Creek Oil and Gas Company and Elmer Hinton in this cause rather confusing and this statement is presented in an effort to clarify the issues.

The petitioners herein by this action attempted to set aside three judgments previously rendered in actions brought in the District Court of Musselshell County, Montana. In all three of those actions the petitioner Grass Creek Oil & Gas Company was a party and in all three it was held that the Grass Creek Oil & Gas Co. had no interest whatsoever in or to the property or the minerals thereon and therein which are the subject of this action.

In one of these cases the petitioner Hinton was a party and it was there adjudged that Hinton had no interest.

The first of the three cases referred to was Staunton vs. Taber, et al. Cause No. 5342 in the records of the said District Court. That case was a quiet title action by one Staunton as executor of the estate of John Whelan, deceased, involving the lands and the minerals involved in this actoin and in which case the claim of the Grass Creek Oil & Gas Co. was adjudicated. The judgment roll in that case was received in evidence in the District Court in this cause as Exhibit D, which exhibit was certified to the Supreme Court of Montana and has been certified to this Court. The complaint in that case is set forth as Appendix

E to the petition and the judgment is set forth as Appendix F. No action was taken to annul, vacate or set aside that judgment and no appeal was taken therefrom. For convenience we shall hereinafter refer to that cause as the Staunton action.

The second case was Hinton et. al. vs. Staunton et. al., Cause No. 5342 in the records of the State District Court, which was an action by the petitioner Hinton to quiet title to the land here involved and the minerals therein and thereunder. In that case the claims of both petitioners were adjudicated. The judgment roll in that case was introduced in the State District Court in this cause as Exhibit A and was certified to the State Supreme Court and to this Court and the findings and conclusions in that cause appear as Appendix D to the petition. Hinton and the Grass Creek Oil & Gas Co. took an appeal from that judgment and the Supreme Court of Montana affirmed it. Hinton et. al. vs. Staunton et. al. 124 Mont. 534, 228 Pac. (2d) 461. For convenience we shall refer to that action as the Hinton case.

The third of these cases was Grass Creek Oil & Gas Co. vs. Musselshell County, Montana, et. al. Cause No. 5406 in the records of the State District Court. That case was brought by the Grass Creek Oil & Gas Co. to quiet title to an undivided one-half interest in and to all oil and gas and other minerals in and under the land in controversy. There again, the Grass Creek Oil & Gas Company was

adjudged to be without any interest whatsoever. The judgment roll in that case was received in evidence in the State District Court as Exhibit B and was certified to the Supreme Court of Montana and to this Court. An excerpt from the findings of fact in that case appear as Appendix C to the petition. The Grass Creek Oil & Gas Company took an appeal from that judgment and the Supreme Court of the State of Montana affirmed. The Grass Creek Oil & Gas Co. vs. Musselshell County et. al., 124 Mont. 594, 228 Pac. (2d) 968. For convenience we shall refer to that case as the Grass Creek case and to the Grass Creek Oil & Gas Co. as the Grass Creek Co.

The interests of the respondents herein are the only mineral interests in the land described in the complaint, which these petitioners have not previous to this case attacked and respondents' title to these interests traces to the same sources as do the titles which these petitioners have previously attacked in the Hinton and Grass Creek cases with such complete lack of success.

ARGUMENT

There has been no taking of property without due process of law. The requirements of due process of law have become well settled. In Mitchell vs. Banking Corporation of Montana, 94 Mont. 183, 22 Pac. (2d) 155, the Supreme Court of Montana stated those requirements as follows:

"Due process of law guaranteed under Section 1 of the Fourteenth Amendment to the Constitution of the United States, and Section 27 of Article 3 of the Montana Constitution, requires a hearing or an opportunity to be heard before being concluded by a judgment. Chauvin v. Valiton, 8 Mont 451, 20 Pac, 658, 3 L.R.A. 194; 33 C. J. 1106."

The petitioner Grass Creek Co. was given a hearing or an opportunity to be heard in all three of the previous actions.

The petitioner Hinton bases his claim to title to the minerals upon a deed from the Bankers Farm Mortgage Co. of March 28, 1949, and a deed from Catherine Brown Moffett and Della R. Brown as heirs of Harry C. Brown of May 6, 1949 (pp. 5, 6 of the Petition). The Bankers Farm Mortgage Company was given a hearing or an opportunity to be heard in the Staunton case as were Catherine Brown Moffett and the unknown heirs and devisees of Harry C. Brown. Hinton himself was given a hearing in the Hinton case. In American Ry. Express Co. vs. Commonwealth of Kentucky, 47 Sup. Ct. 353, 273 U. S. 269, 71 L. Ed. 639, this Court said:

"It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of the property without due process of law."

The contention of the petitioners that there has been a taking of property without due process of law apparently

stems from a lack of understanding of the difference between jurisdictional errors and errors within jurisdiction. The court clearly had jurisdiction in the Staunton case to determine the interest, if any, of the petitioner Grass Creek Co. and of the parties through whom the petitioner Hinton claims title to the minerals. Jurisdiction and the power to decide necessarily includes the power to make a wrong decision as noted by this Court in the case above cited. In Coconougher vs. Montana Life Insurance Co. et. al., 103 Mont. 536, 64 Pac. (2d) 845, the Supreme Court of Montana presented the following discussion:

> "From what we have said supra, it appears that the conclusions of law were erroneous, at least to the extent of adjudging that the parties owned the right to use the water as tenants in common, and perhaps in other particulars. Thus the question is presented, may the defendants in this action, *where they have by appropriate allegations directly assailed the former judgment, secure a review of and have it declared invalid and ineffectual?* We think not. In 3 Freeman on Judgments, fifth edition 2531, it is said: 'It is clear that courts of equity will not exercise any supervisory authority over the mere mode of proceedings in other tribunals, and hence will never enjoin a judgment on the ground of any mere irregularity, unless of so serious a character as to prove that the court pronouncing the judgment against which relief is sought was without jurisdiction. *As a final judgment or decree cannot be avoided in equity on account of any errors of law entering into it and affecting the merits of the controversy,* it could hardly be contended that

mere errors in proceedings could have a greater effect. It is therefore conceded that equity will not interfere with a judgment on account of alleged irregularities occurring in the exercise of lawful jurisdiction. The rule thus declared has been recognized by many courts even where the attack is directly made and so considered as is illustrated by the following cases: Johnson v. Reed, 125 Cal. 74, 57 Pac. 680; Holeenbeak v. McCoy, 127 Cal. 21, 59 Pac. 201; Welsh v. Koch, 4 Cal. App. 571, 88 Pac. 604; In re Estate of Culver, 159 Iowa 679, 140 N.W. 878; Publishing House v. Heyl, 61 Kan. 634, 60 Pac. 317.

"Whether or not a court has jurisdiction of an action is often a troublesome question and much confusion of thought is found in the discussion of this subject. *There is a manifest distinction between the right to decide and a right decision.* In the case wherein judgment was pronounced the court had the right to decide and, therefore, jurisdiction, but did not render a right decision, *which was an error that might be corrected only on motion for a new trial or appeal to this court,* but no appeal was perfected." (Emphasis supplied).

Petitioners cannot assail the three previous decisions in this action no matter how incorrect they may be and at this point we should perhaps remark that we make no argument in this cause as to whether or not those decisions were correct, deeming that such argument is here immaterial. Petitioners' contention that these decisions were in excess of jurisdiction because the tax deeds were void, if they were void, and we deem it unnecessary to argue that